92-819

Supreme Court, U.S.
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No. 92 -_____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBINSON O. EVERETT, INDIVIDUALLY,
ROBINSON O. EVERETT, EXECUTOR
OF KATHRINE R. EVERETT,
and J. H. FROELICH,

Petitioners,

v.

CONTINENTAL BANK, N. A.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION DEPRIVED THEM OF DUE PROCESS OF LAW?

II.

WHETHER THE APPLICATION OF A 1989 STATUTE TO A 1984 CONTRACT DENIED PETITIONERS DUE PROCESS AND IMPAIRED THEIR CONTRACT WITH RESPONDENT?

III.

WHETHER, IN GRANTING SUMMARY JUDGMENT AGAINST PETITIONERS ON THEIR DEFENSES AND COUNTERCLAIMS, THE DISTRICT COURT DEPRIVED THEM OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL?

IV.

WHETHER THE COURT OF APPEALS DENIED PETITIONERS PROCEDURAL DUE PROCESS BY IMPROPERLY INVOKING WAIVER?

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No. 92 -_____

In the

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OCTOBER TERM, 1992

ROBINSON O. EVERETT, INDIVIDUALLY,
ROBINSON O. EVERETT, EXECUTOR
OF KATHRINE R. EVERETT,
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Petitioners,

v.

CONTINENTAL BANK, N. A.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

Petitioners, Robinson O. Everett, Individually, Robinson O. Everett, Executor of Kathrine R. Everett, and J. H. Froelich, respectfully pray that a writ of certiorari issue to review the judgment

and opinion of the United States Court of Appeals, Seventh Circuit, entered on May 21, 1992, with rehearing denied on August 12, 1992.

OPINION BELOW

The opinion of the United States Court of Appeals, Seventh Circuit is reported in 964 F.2d 701 and is reproduced in the Appendix. The opinions of the United States District Court for the Northern District of Illinois are reported in 742 F.Supp. 508 (personal jurisdiction); 760 F.Supp. 713 (liability), and 768 F.Supp. 246 (damages).

JURISDICTION

Jurisdiction in the District Court was founded upon diversity of citizenship under 28 U.S.C. § 1332. Respondent, which initiated the action, is a national banking association with its principal

place of business in Chicago, Illinois. See, 28 U.S.C. 1348. Petitioners are citizens of North Carolina. The amount in controversy exceeds $50,000.

Final judgment as to damages was entered in the District Court on July 22, 1991; and petitioners filed their notice of appeal on August 20, 1991. Appeal was taken to the Court of Appeals pursuant to 28 U.S.C. 1291; and after it rendered its opinion and judgment on May 21, 1992, a petition for rehearing was filed, which was then denied on August 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. CONST. art. I, § 10:

No state shall ... pass any bill of attainder, ex post facto law, or law

impairing the obligation of contracts... .

U.S. CONST. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

U.S. CONST. amend. XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Ill. Rev. Stat. ch. 110 § 2-209(a):

(a) Any person, whether or not a citizen or resident of this State, who in person does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her

representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts. . . .

(7) The making or performance of any contract or promise substantially connected with this State . . .

STATEMENT OF THE CASE

In the fall of 1983, Guilford Telecasters, Inc. (hereinafter Guilford) which operates WGGT-TV, a television station in Greensboro, North Carolina, negotiated a $4,200,000 loan from respondent, Continental Bank, N.A. (hereinafter "Continental"). As a condition of this loan, each of Guilford's stockholders was required to execute loan guaranties with limits in proportion to ownership of the stock. The loan was closed by mail early in January 1984 and

the various guaranties were executed, as required initially by the loan commitment and thereafter by the loan documents. The loan was to be repaid quarterly over a seven-year period with interest floating above prime and with reduction of principal to begin in 1986.

As a result of cash flow problems, on December 31, 1986, Guilford filed a petition for reorganization under the bankruptcy laws. Pursuant to a consent order, Guilford was allowed use of cash collateral; but it was to pay interest to Continental on a weekly basis and also to amortize principal in weekly instalments of $5,250. This amortization was slightly greater than the amount of principal reduction that would have taken place in 1987 under the original loan agreement.

After a few months Guilford was

unable to make these payments; and so, beginning in May 1987, they were paid by the guarantors on a pro rata basis. For its convenience, as well as that of the guarantors, Continental billed and collected payments of interest and principal from the guarantors at four-week intervals, rather than weekly.

Meanwhile, in August 1987, the Bankruptcy Judge had ruled that, because of its failure to file properly the financing statements required by the Uniform Commercial Code and other laws, Continental was not entitled to the security interest it claimed in the broadcast license of WGGT-TV and in valuable tower and studio leases that Guilford had negotiated for the television station.

In the fall of 1989 disagreement

arose between the guarantors and Continental over at least two topics. First, on September 1, 1989, Continental notified the guarantors that it wanted to collect by December 31, 1989, the difference between the amount of principal that would have been collected under the payment terms of the original loan agreement and the amount of principal Continental had received under the $5,250 per week principal-reduction schedule. The guarantors, on the other hand, maintained that Continental had agreed with them on an amortization of the principal at the $5,250 per-week level until a reorganization plan was confirmed or until Guilford's principal asset, WGGT-TV, was sold.

Secondly, Guilford and its stockholders had filed a reorganization plan in

August 1989, which provided for full repayment to Continental of principal and interest over a period of several years; but, despite their pleas for Continental's approval, the Bank voted against the plan.

Because of these disagreements, the guarantors stopped paying at the beginning of 1990, whereupon, in March 1990, Continental initiated this diversity action against the petitioners and other guarantors. [1]

The petitioners initially moved to dismiss because of lack of personal jurisdiction over them and because they had not done business in Illinois, within the meaning of Ill. Rev. Stat. Chapter

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[1] The other stockholder guarantors who were sued reached settlements with Continental; and, as to them, the suit was dismissed.

110, §§ 2-209. The District Court denied this motion to dismiss; but noted that, for purposes of the motion, "disputed facts are viewed in favor of the party asserting jurisdiction", 742 F.Supp. 508, n.1, and that, "Despite its ability to avoid dismissal at this early stage of the litigation, Continental must nonetheless adduce sufficient facts at trial demonstrating the existence of personal jurisdiction." 742 F.Supp. 512, n.7.

Petitioners then filed answers with several defenses and counterclaims. They alleged that they had been induced to guarantee the Guilford loan because, as a result of Continental's misrepresentations and failure to disclose, petitioner believed that they would have subrogation rights in Guilford's valuable broadcast license for WGGT-TV. Another

defense -- based on the 1987 ruling by the Bankruptcy Judge -- was that Continental had impaired petitioners' subrogation rights in various collateral. The petitioners also alleged Continental's breach of its agreement with the guarantors that the amortization schedule would remain at $5,250 per week until a plan of reorganization was confirmed or WGGT-TV was sold.

The District Court then entered summary judgment against petitioners on these defenses and counterclaims. 760 F.Supp. 713. In the same opinion the court found from its review of the summary judgment exhibits that the facts supporting the court's earlier determination of personal jurisdiction "are not in dispute"; and so there were "no jurisdictional barriers to the entry

of summary judgment." 760 F.Supp. at 725.

In July 1991 the District Court entered summary judgment against the petitioners for amounts close to the limits provided in the guaranties, 768 F.Supp. 246 -- even though the combined liability limits exceeded the unpaid balance of Guilford loan. Despite petitioners' protests, the District Court declined to determine the balance of that loan, but it commented that "Continental certainly cannot collect more than is due and owing." 768 F.Supp. 247, n.1.

Meanwhile, over Continental's objection, the bankruptcy judge had confirmed Guilford's plan of reorganization after finding that the Bank would be paid in full and that the plan's treatment of Continental was "overly generous." In re Guilford Telecasters,

Inc., 128 B.R. 622, 627 (Bankr. M.D.N.C. 1991). The plan then was consummated on July 1, 1991. By December 31, 1991, the end of the loan term under the original loan agreement, Guilford had paid Continental in full, except for some penalty interest.

ARGUMENT

I. THE PETITIONERS DID NOT HAVE THE MINIMUM CONTACTS WITH ILLINOIS NECESSARY TO CREATE PERSONAL JURISDICTION.

As the Court has made clear:

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court over a nonresident defendant. See Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 108-9 (1987). [2]

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[2] Since this is a diversity action, the criteria for personal jurisdiction are the same as they would be for the exercise of personal jurisdiction over petitioners by an Illinois State Court.

A State assertion of personal jurisdiction must not violate "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940).

In determining whether personal jurisdiction exists, the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." See Burger King Corporation v. Rudzewicz, 471 U.S. 462, 474 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 326 (1945).

Furthermore, "it is essential in each case that there be some act by which the defendant purposefully avails itself of

the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." See Burger King, supra, at 475, quoting Hanson v. Denckla. 357 U.S. 235, 253 (1958). See also, Asahi Metal, supra at 112. This "purposeful availment" requirement ensures that a defendant will not be haled into court in a distant location as the result of the "unilateral activity of another party or a third party", see Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417 (1984).

Apparently there is an open issue as to whether the exercise of personal jurisdiction over nonresident individuals must be given even closer scrutiny than the exercise of such jurisdiction over foreign corporations. Cf. Burnham v.

Superior Court of California, ___ U.S. ___, 110 S.Ct. 2105, 2110, n.1 (1990).

Petitioners did not have the "minimum contacts" with Illinois which would be necessary to establish personal jurisdiction over them in the courts of that state. They are residents of North Carolina, who guaranteed a loan to a North Carolina corporation of which they are stockholders. That corporation does business only in North Carolina. All the collateral was located in that State. None of the petitioners went to Illinois to procure, negotiate, or close the loan. On the other hand, a Continental vice-president came to North Carolina from Chicago before the loan was made and later mailed the loan commitment to Guilford's president in North Carolina. The loan itself was closed by mail.

After the loan to Guilford was closed, Continental representatives came to North Carolina on various occasions to visit Guilford and to solicit new loan business from other customers. After the reorganization proceeding was commenced on December 31, 1986 -- more than three years before this action was commenced -- Continental representatives visited North Carolina from time to time to participate in that proceeding and to determine how Guilford was progressing.

The guaranties executed by petitioners are on standard forms prepared by Continental's attorneys and recite that they were "delivered at Chicago, Illinois." This "delivery", however, was accomplished by mail and under the circumstances here could hardly constitute one of the "minimum contacts" contemplated

by International Shoe. Some payments by the petitioners were mailed to Chicago, while others were mailed to Continental's North Carolina attorney. Although the loan documents prepared by Continental stated that they were "governed by the laws of the State of Illinois", they did not reveal any "deliberate affiliation" with Illinois and -- unlike a consent-to-suit provision -- they did not suggest "the reasonable foreseeability of possible litigation" in Illinois. Cf. Burger King, supra, at 482.

There is no indication that the courts below conducted the thorough evaluation which this Court has required in ruling on personal jurisdiction. See Asahi, supra, at 113-114. Indeed, in view of the burden on petitioners in being required to defend themselves in Illinois

when all of the events material to their defenses had occurred in North Carolina, [3] it seems clear that such an evaluation would have led inevitably to the conclusion that exercise of personal jurisdiction did not comport with "fair play and substantial justice."

Often, just as here, individuals who have invested in a corporation will guarantee loans made to it by an out-of-state lender. In light of this recurring situation, it is important that the Court assure adherence to the principles established by International Shoe and its successors. Review should be granted because those principles were disregarded

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[3] The burden on petitioners of defending in Illinois is reflected in Continental's claim for attorneys' fees that exceeded $400,000 some months ago. 964 F.2d 701.

by the courts below.

II. THE COURT OF APPEALS ERRED IN APPLYING A 1989 AMENDMENT OF THE ILLINOIS LONG-ARM STATUTE TO A 1984 AGREEMENT.

In petitioners' unsuccessful motion to dismiss for lack of jurisdiction, they asserted that they were not transacting business within the meaning of the Illinois long-arm statute, Ill. Rev. Stat. ch. 110 § 2-209(a)(1), and that, therefore they were not subject to the State's jurisdiction. After the District Court ruled against them, petitioners raised the issue again on appeal.

During oral argument, Circuit Judge Easterbrook called attention to § 2-209 (a)(7) which had been approved and taken effect on September 7, 1989. This new provision -- which had not been mentioned

in any of the briefs -- stated that any person submitted to Illinois jurisdiction by "[t]he making or performance of any contract or promise substantially connected with this State."

Subsequently, in the opinion by Judge Easterbrook, the Court of Appeals ruled that, by reason of § 2-209(a)(7), petitioners had submitted to Illinois jurisdiction. Thus, because of the promises they had made in 1984 and the 1989 addition of subsection (a)(7) to § 2-209, petitioners were held to be subject to suit in Illinois in March 1990.

Admittedly, this result does not violate the ban against any ex post facto law, because no criminal penalties are involved. Arguably, it contravenes the constitutional prohibition on impairment of contracts, for the statutory change

alters the legal effect of the original guaranty agreements between the petitioners and Continental. Even more applicable, however, is the Due Process Clause of the Fourteenth Amendment.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Court held that the South Carolina Supreme Court had deprived defendants of due process by giving retroactive effect to its new construction of a criminal statute. In Marks v. United States, 430 U.S. 188 (1977), the Court reversed a federal obscenity conviction because of retroactive application of new standards for imposing liability. Although both Bouie and Marks are criminal cases, petitioners submit that the basic principle of notice which they involve is equally applicable in this case. Certainly when petitioners executed their

guaranties in 1984, they had no warning that, because of an Illinois statute enacted more than five years later, they were submitting themselves to the jurisdiction of Illinois courts. Thus, petitioners were denied a meaningful choice whether or not to submit themselves to Illinois jurisdiction.

In Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 678 (1930), -- which was cited in Bouie, supra at 354 -- the retroactive application of an overruling state supreme court decision was held to have denied the petitioner "due process of law -- using that term in its primary sense of an opportunity to be heard and to defend its substantive right" as to a tax assessment. In Ettor v. Tacoma, 228 U.S. 148(1913), a property owner was denied due process because of the effect of a new state law

on his accrued right to compensation for consequential damages.

In light of this Court's prior decisions concerning retroactive legislation and adjudication, petitioners submit that the Seventh Circuit's retroactive application of ch. 110 § 2-209(a)(7) violates their Fourteenth Amendment right to due process. [4] In view of the importance of preventing unconstitutional retroactive interpretation of new legislation -- whereby citizens are compelled to act without fair warning of the consequences -- the Court should grant certiorari to review this

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[4] Because the retroactive application of this statute probably originated with the Seventh Circuit -- rather than with the Illinois legislature -- a violation of Fifth Amendment due process is also implicated.

issue.

III. THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT AS TO LIABILITY VIOLATED PETITIONERS' RIGHT TO A JURY TRIAL.

In their answer petitioners allege both as an answer and a counterclaim that Continental had violated its own agreement with the guarantors that reduction of principal would remain at the same level -- $5,250 per week -- until the plan of reorganization had been confirmed or a sale of television station WGGT-TV had occurred. The District Court concluded that the evidence was insufficient to raise a genuine issue of fact as to the existence of a binding agreement.

The District Court had before it various affidavits from persons who believed an agreement existed. In

addition, several documents related to this issue. One was the cash collateral order which had been entered with Continental's written consent in the winter of 1987 and which provided for the principal reduction at a rate of $5,250 per week. Another was a Bank inter-office memo dated August 8, 1988 which had been initialed by all the Bank officials who were handling the loan. This document stated:

> Until a plan is approved and under the terms of a cash collateral order, [Continental] is to receive weekly principal ($5,250) and accrued interest payments. These payments, which began on January 23, 1987, were made by the station through April 30, 1987. When WGGT was no longer able to meet its debt service obligations due to declining sales, [Continental] began collecting the guarantors' pro rata shares of these payments.
>
> * * * * * * *
>
> Continental does, however, continue to receive principal and interest

> payments, on a monthly basis, from the guarantors. Collection of these payments will continue until either a plan of reorganization (which incorporates the full repayment of the Continental debt is approved and implemented or, in the alternative, the station is sold and the Continental debt is repaid in full with these sale proceeds.

In determining whether to grant summary judgment under Federal Rule 56 of Civil Procedure, a judge must recognize that "inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses." see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271 (1986) (Rehnquist, J. dissenting), citing Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). Here the jury should have been allowed to consider whether the various documents executed or prepared by Continental officers and agents established the agreement on payment

schedule.

In their answer petitioners also asserted that in 1983 Continental not only failed to disclose information concerning the collateral it would obtain from Guilford but also misrepresented what collateral it would obtain. In that regard, petitioners relied on provisions of the loan commitment and loan documents submitted by Continental to Guilford and to petitioners. Just as with the documents bearing on the repayment schedule, the jury should have been allowed to determine whether in their view the loan commitment and loan documents misrepresented matters known to Continental and whether petitioner relied on those representations. If a jury found that such misrepresentations existed and were relied on, then the conclusion of

both the District Court and the Circuit Court that Continental was not liable under Illinois law for failure to disclose fails to address the gravamen of this defense by petitioners.

Rule 56 performs a useful service when properly used; but when improperly used, it violates the Seventh Amendment right to a jury trial. In this case, the misuse of the Rule resulted from a conflict with this Court's decisions that it is the jury's prerogative to draw inferences from documentary evidence.

IV. THE COURT OF APPEALS DENIED PETITIONERS DUE PROCESS BY ITS IMPROPER INVOCATION OF WAIVER.

On July 22, 1991, the District Court entered summary judgments against the petitioners for damages based on their limits of liability. At that time

Guilford owed Continental a substantial amount under the plan of reorganization. However, by December 31, 1991 -- the date when under the original loan agreement the balance of the loan was to be repaid -- all the principal and interest owed to Continental by Guilford had been paid.

The Ninth Circuit has held that a default is "cured" when the debtor in a reorganization pays the principal and interest owed and therefore the creditor is not entitled to default interest. In re Southeast Co., 868 F.2d 335 (9th Cir. 1989); In re Entz-White Lumber & Supply Co., 850 F.2d 1338 (9th Cir. 1988). If this premise is correct, then it would appear that the default would also be "cured" as to a surety. [5]

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[5] Petitioners recognize that discharge of a debtor in bankruptcy does not discharge a surety. However, the Ninth

In discussing penalty interest in the last paragraph of its opinion, the Court of Appeals states:

> The district court held, 768 F.Supp. at 247, n.4, that penalty interest is due from January 1, 1990, when the defendants dishonored their guarantees. The guarantors did not present this as an issue on apeal separate from their main argument. Any additional arguments they may have, they have waived. 964 F.2d at 708. (Emphasis supplied)

According to the classic definition, "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Until Guilford made the final payment to Continental on December 31, 1991, long after the appeal had been taken in this case, petitioners had no "right" to claim whatever benefit

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Circuit cases involve "cure" of default rather than discharge of a debtor.

might accrue from payment. To hold that petitioners have "waived" this argument long before it became available to them denies "due process of law -- using that term in its primary sense of an opportunity to be heard and to defend [their] substantive right." See Brinkerhoff-Faris, supra at 678.

Because of the conflict with this Court's applicable decisions, review should be granted on this issue.

CONCLUSION

The petitioner has raised some important issues as to which the decision of the court below conflicts with applicable decisions of this Court. Review should be granted so that the issues may be briefed, orally argued, and then receive the thorough consideration of the Court.

Respectfully submitted this 10th day of November, 1992.

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APPENDIX

EDITOR'S NOTE

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In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2979

CONTINENTAL BANK, N.A.,

Plaintiff-Appellee,

v.

ROBINSON O. EVERETT, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 1476—Nicholas J. Bua, Judge.

ARGUED APRIL 13, 1992—DECIDED MAY 21, 1992

Before CUDAHY, EASTERBROOK, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Guilford Telecasters, Inc., which operates WGGT-TV in Greensboro, North Carolina, borrowed $4.2 million from Continental Bank in 1984. Continental obtained guarantees from the firm's stockholders, each of whom is jointly and severally liable up to a limit based on his proportional ownership of the stock. Robinson Everett and the estate of Kathrine Everett, his mother, own 65% of the stock between them. Each guaranteed roughly $1.6 million of Guilford's debt. J.H. Froelich, who owns a smaller bloc, guaranteed about $545,000 of the debt. Other investors assumed proportional obligations.

Guilford encountered cash flow problems and in 1986 filed a bankruptcy petition. Continental, which had a security interest in Guilford's receivables, consented to their use in operating the business, if Guilford remained current on the loan—which it did, until May 1987. Then the guarantors took over, in order to fulfill the condition on which Guilford had access to cash. During 1989 the guarantors and Continental reached a pass over two topics. First, Continental insisted that the guarantors pay according to the schedule negotiated before the bankruptcy, under which the payments increase with time to retire additional principal. The guarantors insisted that they had to pay only the amount due each month when the bankruptcy began. Second, Continental as creditor voted against the plan of reorganization proposed by the debtor and supported by the guarantors in their roles as its investors and managers. (Robinson Everett, a professor of law who was at the time the Chief Judge of the United States Court of Military Appeals, was not a manager of the TV station but took an active role as an investor.) At the beginning of 1990 the guarantors stopped paying. Continental responded with this diversity action. All guarantors except Froelich and the two Everetts paid up. From now on, we refer to these three collectively as "the guarantors."

Initially the guarantors attempted to persuade the district judge that the court lacked personal jurisdiction over them. The judge disagreed, holding that by guaranteeing a loan with a Chicago bank, promising to pay in Illinois, agreeing that any dispute would be resolved under the law of Illinois, and so on, the defendants were doing business in Illinois for purposes of Ill. Rev. Stat. ch. 110 ¶2-209(a)(1). 742 F. Supp. 508 (N.D. Ill. 1990). Next the court granted summary judgment for the Bank, 760 F. Supp. 713 (1991), and finally determined the sums remaining to be paid on the guarantees, 768 F. Supp. 246 (1991). Meanwhile the bankruptcy judge confirmed Guilford's plan of reorganization, cramming the plan down an objecting Continental's throat after finding that the Bank would be

paid in full. *In re Guilford Telecasters, Inc.*, 128 B.R. 622 (Bankr. M.D. N.C. 1991). Guilford has since paid principal and interest—but not in full. It did not pay the penalty interest that the Bank has claimed from the guarantors on account of the default in January 1990. This sum of approximately $75,000, plus the legal fees the Bank has incurred pursuing the guarantors, are the remaining stakes.

Appellate jurisdiction is the first topic. The guarantees entitle the Bank to recover the attorneys' fees incurred in the course of collection. The fees are substantial, exceeding $400,000, as the guarantors have fired off a fusillade of defenses. The district court entered judgment on the guarantees but put off determining the precise amount payable as fees. An open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal on the guarantees of the principal and interest. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (merits and fees appealable separately); *Buggs v. Elgin, Joliet & Eastern Ry.*, 852 F.2d 318, 321 n.3 (7th Cir. 1988) (failure to quantify award of fees does not prevent appeal on the merits); *Exchange National Bank v. Daniels*, 763 F.2d 286 (7th Cir. 1985) (fees due under contract and those required by law are treated the same for purposes of appellate jurisdiction). Contra, *Justine Realty Co. v. American National Can Co.*, 945 F.2d 1044 (8th Cir. 1991) (when fees are provided by contract, judgment on the merits is not appealable until fees have been quantified).

Next comes personal jurisdiction. The district court concluded that the entire course of dealings amounted to "transaction of any business within" Illinois. Ill. Rev. Stat. ch. 110 ¶2-209(a)(1). Whether the court's understanding of "business" is correct does not matter. Late in 1989, before the Bank commenced this suit, Illinois amended its long-arm statute to assert personal jurisdiction over those who participate in "[t]he making or performance of any contract or promise substantially connected with this State", ¶2-209(a)(7). The loan and guarantees are "substantially connected with" Illinois—the documents recite that they

were delivered and executed in Illinois, the loan was to be repaid in Illinois, and the guarantors agreed that Illinois law would govern. These same considerations show that personal jurisdiction is consistent with the due process clause of the fourteenth amendment. *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 283-84 (7th Cir. 1990); *Madison Consulting Group v. South Carolina*, 752 F.2d 1193 (7th Cir. 1985); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971).

On to the merits. All of the guarantors' defenses (and mirror-image counterclaims) are variations on the theme that the Bank left the loan undersecured, exposing the guarantors to more risk than they anticipated. Continental's obligation to Guilford was contingent on Guilford's providing the Bank with security interests in, among other things, its broadcasting license and its leased broadcasting facilities. Continental funded the loan without obtaining a security interest in the license, having concluded that such an interest is legally impossible. And although Guilford took the steps necessary to grant a security interest in its leaseholds, the Bank failed to perfect that interest. The Bank obtained an interest in Guilford's receivables and other assets, but the guarantors say this is insufficient, that the Bank's taking the full security was essential for their protection. They add that the Bank defrauded them by not revealing what it knew and they did not: that because a broadcast license is not property, 47 U.S.C. §301, and may not be assigned or transferred without the FCC's permission, 47 U.S.C. §310(d), the license itself is not a store of value on which the Bank could levy. *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390-91 (6th Cir. 1986); *In re Merkley*, 94 F.C.C.2d 829 (1983). Cf. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 25-40 (1959).

Although the guarantors argue that the Bank defrauded them, that effective security was a condition precedent to the effectiveness of the loan and guarantees, and that the Bank impaired the value of the collateral, these

amount to the same thing, and we treat the position as one argument. Professor Everett, arguing on behalf of all three guarantors, conceded that he had not found a case in Illinois (or any other jurisdiction) requiring a lender to reveal to a guarantor the value of the borrower's assets as collateral. No surprise. It amounts to saying that a potential debt investor in a firm (which a bank is) owes a duty of care, perhaps even a duty of loyalty, to the existing equity investors (which Guilford's guarantors are) or contingent debt investors (which all guarantors are, given the possibility of subrogation, see *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1194-97 (7th Cir. 1989)). That is unheard-of in either corporate or banking law. A bank making a commercial loan depends largely on the success of the business for repayment. The firm has the best information about its business and prospects and accordingly may be obliged to disclose some details to the bank and the guarantors. Even that duty is attenuated, for persons negotiating for a contract usually may keep valuable information to themselves. They may not lie, but they need not volunteer. The ability to capitalize on private information is an important goad to create that knowledge, which may be important in matching assets with their most productive use. See generally E. Allan Farnsworth, 1 *Contracts* §4.11 at 406-10 (1990), and Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1 (1978), both of whom collect and analyze the cases. Banks' self-interest leads them to nose out the value of collateral; if they do not, they are apt to suffer loss. Borrowers and guarantors have their own reasons to know the value of the assets. None acts as fiduciary of another. *Farmer City State Bank v. Guingrich*, 139 Ill. App. 3d 416, 423, 487 N.E.2d 758, 763 (4th Dist. 1985).

The general principle that parties to arms' length negotiations need not open their files to each other is especially apt here, because the bit of information the guarantors wanted Continental to reveal—that it could not obtain a security interest in a broadcast license—is both public and

irrelevant. It is public because it is a legal conclusion, having nothing to do with facts peculiar to WGGT-TV or information buried in Continental's vaults. One side in negotiations need not disclose the United States Code to the other; the statutes, regulations, and cases are available to all. Like other states, Illinois takes the position that failure to disclose the law cannot be the foundation for redress. E.g., *Aurora v. Green*, 126 Ill. App. 3d 684, 688, 467 N.E.2d 610, 613 (2d Dist. 1984); *Hamming v. Murphy*, 83 Ill. App. 3d 1130, 1135, 404 N.E.2d 1026, 1030 (2d Dist. 1980). So, too, Illinois expects guarantors to inquire into risks. *St. Charles National Bank v. Ford*, 39 Ill. App. 3d 291, 295, 349 N.E.2d 430, 434 (2d Dist. 1976). If Guilford and the guarantors wanted to know whether a broadcast license may be used as collateral, they had only to ask their own lawyer. *McLean County Bank v. Brokaw*, 119 Ill. 2d 405, 417, 519 N.E.2d 453, 458 (1988). Not surprisingly, they had counsel to advise them about the intricacies of communications law. If as the guarantors now say the use of a license as collateral is a debatable issue, so that their lawyer's views were unreliable, it is all the more reason why Continental cannot be accused of "fraud" for failing to "reveal," as if it were a fact, its view of the law. But the whole subject is irrelevant. A broadcast license is not a tangible asset. It can't be melted down, sold as scrap, or packed up and sent to Alaska. Its value lies in access to a given frequency in a specific place, which yields time that may be sold by the minute to advertisers. The value of the license to Guilford lay in the income stream from those advertisers. Continental wanted, and got, a security interest in that income, which it could enjoy while Guilford remained the owner of the license and operator of WGGT-TV. What more would it have had with a security interest in the license? An ability to sell the license to someone able to extract greater revenues is not much different from the ability to replace Guilford's managers in the bankruptcy. This makes it hard to see how the Bank's failure to reveal 47 U.S.C. §301 to the guarantors did them injury.

In the end the parties' rights are fixed by their contracts, which contain three dispositive provisions. First, they say that the security is for the benefit of the lender, not of the borrower or guarantors. Second, they provide that the "Bank shall have no duty as to the collection or protection of the Collateral or any part thereof or any income thereon, or as to the preservation of any rights pertaining thereto, beyond the safe custody of any Collateral actually in the Bank's possession." Third, the guarantors "expressly waive[ ] . . . all diligence in collection or protection of or realization upon . . . any security for" the loan to Guilford, and permit the Bank to "release . . . any property securing" the loan without notice to them. It could hardly be clearer that the lender is free to do what it wants with the collateral. 760 F. Supp. at 719. Illinois enforces clauses of this kind, which are fatal to the guarantors' position. *Lawndale Steel Co. v. Appel*, 98 Ill. App. 3d 167, 172, 423 N.E.2d 957, 961 (2d Dist. 1981); *Ishak v. Elgin National Bank*, 48 Ill. App. 3d 614, 617-18, 363 N.E.2d 159, 161-62 (2d Dist. 1977); see also *FDIC v. Nanula*, 898 F.2d 545, 550 (7th Cir. 1990) (Illinois law). Guarantors may elect to rely on the lender's attention to its own interests as their best protection, preferring market incentives over legal remedies and receiving lower interest rates in exchange.

The guarantors rely on cases such as *Langeveld v. L.R.Z.H. Corp.*, 74 N.J. 45, 376 A.2d 931 (1977), and *First Citizens Bank & Trust Co. v. Sherman's Estate*, 250 App. Div. 339, 294 N.Y.S. 131 (1937), in which the contracts were silent, and the courts concluded that in the absence of agreement the bank had to maximize its realization on the collateral to reduce the guarantors' risk. Judicial attempts to draft standby terms that will govern when the parties neglect to address the subject are just guesses about what the parties would prefer. When the contracting parties draw up their own provisions, courts enforce them. People write things down in order to assign duties and allocate risks—functions vital to economic life yet defeated if courts prefer hypothetical bargains over real

ones or use the ambiguities present in all language to frustrate the achievement of certainty. Cf. *Concast, Inc. v. AMCA Systems, Inc.*, No. 91-2179 (7th Cir. Mar. 10, 1992).

What about the requirement of good faith that is part of every contract? The guarantors say that they are entitled to a jury trial to determine whether the Bank acted throughout in good faith. Once again, the guarantors misunderstand how courts use such principles. The Uniform Commercial Code defines good faith as honesty in fact. UCC §1-201(19). See also 2 *Farnsworth on Contracts at* §7.17a; Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968). Beyond that, and the obligation to be prudent in the exercise of discretion conferred by contract, see *Capital Options Investments, Inc. v. Goldberg Brothers Commodities, Inc.*, 958 F.2d 186, 189 (7th Cir. 1992) (Illinois law), good faith is another way to describe the effort to devise terms to fill contractual gaps. *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 435-36, 438-39 (7th Cir. 1987) (Illinois law); *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984). As a method to fill gaps, it has little to do with the formation of contracts (a point *Frey* stresses, 941 F.2d at 595, but that the guarantors, despite their heavy reliance on *Frey*, ignore) and nothing to do with the enforcement of terms actually negotiated. Because this duty is an estimate of "what parties would agree to if they dickered about the subject explicitly, parties may contract with greater specificity for other arrangements." *Jordan*, 815 F.2d at 436. Our guarantors negotiated with the Bank and agreed to language establishing precisely what duties Continental would have with respect to security: it must safeguard collateral in its possession but has no other obligations. Gap-filling methods such as good faith do not "block use of terms that actually appear in the contract". *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908

F.2d 1851, 1357 (7th Cir. 1990). Accord, *Capital Options*, 958 F.2d at 190-91. The guarantors released Continental from any obligation to use the collateral for *their* benefit. The guarantors may rue their decision but cannot escape it.

At last to the remedy. The parties debated in the district court how to determine the maximum obligation of each guarantor. Under the contracts, payments were to be credited against the caps but interest was to be deducted. Continental and the guarantors contested how to account for the simultaneous payments and running of interest between May 1987 and December 1989. None of this matters any more, for both the penalty interest and liability for attorneys' fees come on top of the cap.

Over the guarantors' protest, the district court declined to determine the amount of Guilford's outstanding liability, observing that because that liability exceeded any of the three guarantors' obligations, the precise figures did not matter. Time has overtaken this assessment. The bankruptcy judge in North Carolina determined the amount Guilford owed. 128 B.R. at 628. Because the district court must now determine the sum due as attorneys' fees, it is prudent for the court simultaneously to fix the amount of penalty interest and enter a single judgment, on which the guarantors will be jointly and severally liable. We remand the case for that purpose.

Only the amount of fees and penalty interest remains in contention. The district court held, 768 F. Supp. at 247 n.4, that penalty interest is due from January 1, 1990, when the defendants dishonored their guarantees. The guarantors did not present this as an issue on appeal separate from their main argument that they owe nothing. Any additional arguments they may have, they have waived. And it should go without saying that the computation of legal fees and costs is not an occasion to reopen any of the substantive issues that we have resolved, or passed in silence as requiring no separate discussion.

AFFIRMED AND REMANDED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 91-2979
Nicholas J. Bua, *Judge*.

August 12, 1992

CONTINENTAL BANK, N.A.,
Plaintiff-Appellee,

v.

ROBINSON O. EVERETT, *et al.*,
Defendants-Appellants.

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 90 C 1476
Nicholas J. Bua, *Judge*.

Order

Defendants-Appellants filed a petition for rehearing on June 4, 1992. A majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 1476
Honorable Nicholas J. Bua, Presiding

CONTINENTAL BANK N.A.,

Plaintiff,

v.

ROBINSON EVERETT, KATHRINE EVERETT, GEORGE LYLES, and J.H. FROELICH,

Defendants.

ORDER

Defendants Kathrine Everett, Robinson Everett, and J.H. Froelich have moved to dismiss this case for lack of personal jurisdiction. For the reasons stated herein, defendants' motion to dismiss is denied.

I. FACTS[1]

Plaintiff Continental Bank N.A. ("Continental") is a national banking association which maintains its principal place of business in Chicago, Illinois. In 1984, Continental made a $4,200,000 loan to Guilford Telecasters, Inc. ("Guilford"), a North Carolina corporation. Guilford obtained the loan to operate a television station in North Carolina.

On January 1, 1984, the parties executed a loan agreement. The loan agreement provides that all payments are

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[1] For purposes of ruling on a motion to dismiss for lack of personal jurisdiction, disputed facts are viewed in favor of the party asserting jurisdiction. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

to be made to Continental in Chicago. *Loan Agreement*, ¶5.1. The loan agreement further provides that it shall be "governed by the laws of the State of Illinois." *Id.* ¶12.5.

Repayment of the loan was guaranteed by several individuals, all of whom are shareholders of Guilford. These individuals executed the guaranties in January 1984. Similar to the loan agreement, the guaranties provide that they shall be construed in accordance with Illinois law. *See Amended and Restated Guaranty*, §8(e).

In 1986, Guilford began experiencing financial difficulties. Guilford eventually defaulted on its loan obligation and, on December 31, 1986, Guilford filed for bankruptcy. Guilford made several more loan payments until May 1987, when it ceased paying altogether. For the next two years, the guarantors continued to make the monthly payments. By December 1989, however, each guarantor stopped making payment to Continental. According to Continental, approximately $3,500,000 remains due and owing on the loan. Seeking to recover the balance of the loan, Continental commenced this diversity action against the guarantors. Three of the guarantors—Kathrine Everett, Robinson Everett, and J.H. Froelich—now claim that this court lacks personal jurisdiction over them.[2]

II. DISCUSSION

In a case based on diversity of citizenship, a federal court has personal jurisdiction over a nonresident defendant only if a court of the state in which the district court sits would have personal jurisdiction. *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, No. 88-2716, slip op. at 4 (7th Cir. July 2, 1990); *Turnock v. Cope*,

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[2] Continental has filed a separate lawsuit against guarantor James Thrash. In that case, Thrash filed a motion to dismiss for lack of personal jurisdiction, which was denied by Judge Plunkett. *See Continental Bank, N.A. v. Thrash*, No. 89 C 4865 (N.D. Ill. Oct. 3, 1989).

816 F.2d 332, 334 (7th Cir. 1987). Illinois courts have personal jurisdiction over a nonresident defendant when the defendant falls within the contours of the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, para. 2-209 (1989). The Illinois long-arm statute provides in relevant part:

> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> . . . .
>
> (f) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon subsection (a).

Id.

Under the long-arm statute, jurisdiction will be proper if the defendant transacted business in Illinois, and if the cause of action arose from the in-state transaction. *Id.* But the invocation of jurisdiction must not only be appropriate under the long-arm statute, it must also comport with the requirements of due process. *Heritage House Restaurants, Inc.*, No. 88-2716, slip op. at 5.

A. Illinois Long-Arm Statute

Continental claims that defendants transacted business in Illinois within the meaning of the long-arm statute. This court agrees. In determining whether a defendant transacted business in Illinois, the court should consider several factors, including: which party initiated the transaction; where the parties entered into the contract; and where

performance, or a substantial part thereof, was to take place. *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 36, 554 N.E.2d 671, 676 (1st Dist. 1990); *Capital Assocs. Dev. Corp. v. Roberts-Ohbayashi Corp.*, 138 Ill. App. 3d 1031, 1037, 487 N.E.2d 7, 11 (1st Dist. 1985).

With respect to the first factor, defendants argue that they did not initiate the transaction because an agent of Guilford—rather than the individual guarantors—made the initial contact with Continental.[3] The long-arm statute explicitly states that actions taken by an agent may provide the basis for asserting jurisdiction. Ill. Rev. Stat. ch. 110, para. 2-209(a) (1989); *see also Heritage House Restaurants, Inc.*, No. 88-2716, slip op. at 8 ("the fact that [the defendant] acted through an agent . . . in its dealings with [the plaintiff] does not affect our jurisdictional analysis"). Nonetheless, defendants claim that Guilford's agent was not acting on their behalf when he initiated the transaction. This argument is unpersuasive. As officers, directors, and shareholders of Guilford, the guarantors naturally had an interest in securing enough funds for Guilford's continued viability. *See Intamin, Inc. v. Figley-Wright Contractors, Inc.* 595 F. Supp. 1348, 1349 (N.D. Ill. 1984). Defendants would benefit, albeit indirectly, from Guilford's ability to obtain the financing necessary for its operations. Although each of the defendants in this case did not personally contact Continental during the initial negotiations, they played a central role in securing the loan. Their decision to execute personal guaranties as an inducement for granting the loan belies any other conclusion.

Another factor which supports a finding of personal jurisdiction is that the loan agreement and guaranties were to be performed in Illinois. In fact, "contract performance in Illinois has of itself been held a sufficient basis for jurisdiction." *Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587,

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[3] Defendants admit that Continental did not initiate the business transaction at issue.

590 (7th Cir. 1984) (citing *Cook Assocs., Inc. v. Colonial Broach & Mach. Co.*, 14 Ill. App. 3d 965, 304 N.E.2d 27 (1st Dist. 1973)). Defendants' only obligation under the loan contract and guaranties was to repay Continental. Ultimately, defendants were responsible for ensuring that payment was made to Continental in Chicago. Since payment was due in Illinois, the loan agreement and guaranties were to be performed primarily in Illinois. *Id.* at 591; *First Nat'l Bank of Chicago v. Boelcskevy*, 126 Ill. App. 3d 271, 274,466 N.E.2d 1182, 1185 (1st Dist. 1984) (the guaranty unambiguously required performance in Illinois because the demand notes were payable in Chicago); *see also Financial Management Servs., Inc. v. Sibilsky, Inc.*, 130 Ill. App. 3d 826, 833, 474 N.E.2d 1297, 1303 (1st Dist. 1985). Moreover, from 1987 to 1989, the Everetts actually performed under the guaranties by sending monthly payments to Continental in Chicago. Although Froelich made several payments to Continental's bankruptcy counsel in North Carolina, he was not relieved of this primary obligation to pay Continental at its offices in Chicago.[4]

A defendant transacts business in Illinois not only when the contract is to be substantially performed in Illinois, but also when the defendant invokes the "benefits and protections" of Illinois law. *Arthur Young & Co..*, 197 Ill. App. 3d at 36, 554 N.E.2d at 675-76; *Boelcskevy*, 126 Ill. App. 3d at 274, 466 N.E.2d at 1185; *see also Ronco, Inc. v. Plastics, Inc.*, 539 F. Supp. 391, 396 (N.D. Ill. 1982).

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[4] The other factor set forth in *Arthur Young & Co., supra—i.e.*, where the contracts were formed—is inconclusive in this case. Defendants contend that they never went to Illinois in connection with the negotiation or execution of the loan agreement and guaranties. Continental, on the other hand, claims that the loan agreement and guaranties were executed in Illinois. *See Affidavit of Kurt W. Anstaett*, ¶6. The contracts contain provisions stating that they were delivered and executed in Chicago, Illinois. While these provisions are not dispositive as to the place of contract formation, they are entitled to some weight.

The loan agreement and the guaranties unambiguously state that Illinois law is to govern the transaction. *See Loan Agreement*, ¶12.5; *Amended and Restated Guaranty*, §8(e). "By choosing to apply Illinois law to this transaction, defendants sought to invoke the protections and benefits of the law of Illinois." *Ronco, Inc.*, 539 F. Supp. at 396; *see also O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971) ("the fact that the guaranty was to be construed according to Illinois law and performed in that state clearly demonstrates that the defendants 'invoked the benefits and protection' of the state"). Having invoked the benefits and protection of Illinois law, defendants voluntarily submitted to the jurisdiction of Illinois courts.

This conclusion is bolstered by the fact that Kathrine and Robinson Everett both came to Chicago and discussed the transaction with Continental.[5] *See Ronco, Inc.*, 539 F. Supp at 396 ("[w]hen a defendant comes to Illinois and engages in negotiations of some substance regarding the transaction from which the cause of action arises, then the defendant is subject to suit in Illinois"). In August 1984, the Everetts first met with Continental in Chicago and discussed the extent of their involvement with Guilford.[6] *Affidavit of Cathleen A. Strenk*, ¶4. Over the next several years, Robinson Everett met with Continental in

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[5] Even if none of the defendants traveled to Illinois in connection with the transaction, the court may nonetheless obtain personal jurisdiction: "The physical presence of a defendants in Illinois during the transaction is not necessary to obtain jurisdiction under the long-arm statute." *Heritage House Restaurants, Inc.*, No. 88-2716, slip op. at 8. A contractual relationship based on telephone and mail contacts may be sufficient to establish jurisdiction over a defendant. *Id.* Thus, the mere fact that defendant Froelich was never physically present in Illinois does not diminish the court's ability to exercise jurisdiction over him.

[6] With a 65% ownership interest, Kathrine and Robinson Everett were the largest shareholders of Guilford.

Chicago on three separate occasions to discuss Guilford's financial status and the guarantors' obligations. *Id.* ¶¶5, 6, 7. Yet, the Everetts argue that they came to Chicago on matters unrelated to the loan agreement, and met with Continental only as a matter of convenience. This argument might have merit if the Everetts had been tricked or lured into coming to Illinois. In the absence of any such evidence, however, the Everetts' appearances in Illinois are significant. The Everetts voluntarily met with Continental in Chicago and discussed the transaction giving rise to the cause of action. This court sees no reason to simply disregard these meetings merely because the Everetts also conducted other business while in Illinois. *Jacobs/Kahan & Co.*, 740 F.2d at 592 n.7.

All of the factors discussed above point in favor of asserting jurisdiction. Admittedly, no single factor standing alone would appear to be sufficient to support *in personam* jurisdiction over the defendants. *AM Int'l Leasing Corp. v. National Council of Negro Women, Inc.*, 627 F. Supp. 1302, 1307 (N.D. Ill. 1986). But the combined weight of the factors persuades the court that defendants have transacted business in Illinois.

In order to fully satisfy the requirements of the Illinois long-arm statute, Continental must not only demonstrate that defendants transacted business in Illinois, Continental must also show that its cause of action arose from defendants' transaction of business. Ill. Rev. Stat. ch. 110, para. 2-209 (1989). That jurisdictional requirement is easily satisfied in this case. Continental's claim is based directly on defendants' obligations under the guaranties; defendants' obligation to pay Continental, and the failure to make such payment, gave rise to Continental's cause of action. Therefore, jurisdiction is proper under the long-arm statute.

B. Due Process

After determining that jurisdiction is proper under the long-arm statute, the court must also ensure that the exercise of jurisdiction does not violate due process. The Due Process Clause protects an individual from the judgment of a state with which he has no "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). However, an individual will be subject to the jurisdiction of the forum state if he "purposefully avails [himself] of the privilege of conducting activities" within that state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A relevant consideration in this due process analysis is foreseeability—whether the defendant's contacts with the forum are such that he could reasonably have anticipated being haled into court in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Heritage House Restaurants, Inc.*, No. 88-2716, slip op. at 13.

In this case, defendants' contacts with Illinois were not merely random or fortuitous. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Rather, defendants purposefully conducted business with a corporation located and doing business in Illinois. *See Heritage House Restaurants, Inc.*, No. 88-2716, slip op. at 13; *see also Lyons Sav. and Loan Ass'n v. Geode, Inc.*, 626 F. Supp. 1141, 1143 (N.D. Ill. 1986) (by borrowing money from an Illinois corporation, the defendant "purposefully availed itself of the privilege of conducting business in Illinois"). Defendants understood the purpose behind the loan and the significance of their guaranties to obtaining the loan. When they failed to make the requisite payments, defendants reasonably could have anticipated being subject to litigation in Illinois. *See O'Hare Int'l Bank*, 437 F.2d at 1177 ("The defendants certainly must have contemplated the effects in Illinois of a failure to make the monthly rental payments."); *see also Geode Inc.*, 626 F. Supp. at 1143-44;

Welles Prods. Corp. v. Plad Equip. Co., 563 F. Supp. 446, 449 (N.D. Ill. 1983).

Based on defendants' contacts with Illinois in relation to the loan transaction, the court concludes the the exercise of personal jurisdiction will not offend the Due Process Clause. Besides, Illinois courts have held that the long-arm statute is narrower in scope than the constitutional due process test; by satisfying the requirements of the Illinois long-arm statute, the plaintiff necessarily satisfies the "minimum contacts" test set forth in *International Shoe* and its progeny. *See Arthur Young & Co*, 197 Ill. App. 3d at 35, 554 N.E.2d at 675; *Green v. Advance Ross Elecs. Corp.*, 86 Ill. 2d 431, 436-37, 427 N.E.2d 1203, 1206 (1981); *see also AM Int'l Leasing Corp.*, 627 F. Supp. at 1308.[7]

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss for lack of personal jurisdiction is denied. Defendants are hereby ordered to answer plaintiff's complaint within ten days of receiving notice of this order.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Nicholas J. Bua
Judge, United States District Court

Dated: August 2, 1990

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[7] Despite its ability to avoid dismissal at this early stage of the litigation, Continental must nonetheless adduce sufficient facts at trial demonstrating the existence of personal jurisdiction. *O'Hare Int'l Bank*, 437 F.2d at 1177 n.2; *Welles Prods. Corp.*, 563 F. Supp. at 449 n.5.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 1476
Honorable Nicholas J. Bua, Presiding

CONTINENTAL BANK N.A.,

Plaintiff,

v.

ROBINSON EVERETT, KATHRINE EVERETT, and J.H. FROELICH,

Defendants.

ORDER

Continental Bank N.A. ("Continental") initiated this lawsuit to recover the balance of an unpaid loan from Robinson Everett, Kathrine Everett, and J.H. Froelich—three guarantors of a bankrupt borrower. On March 28, 1991, this court entered summary judgment in favor of Continental on the issue of liability. 760 F. Supp. 713 (N.D. Ill. 1991). Continental now moves for summary judgment on the issue of damages.

An assessment of recoverable damages starts with the language of the governing guaranty agreements. The liability of Robinson Everett, Kathrine Everett, and J.H. Froelich is limited under their respective guaranties. Continental cannot recover more than $1,569,445 (plus interest and expenses) from Robinson Everett, $1,569,506 (plus interest and expenses) from Kathrine Everett, and $544,866 (plus interest and expenses) from J.H. Froelich. *See* Guaranty Agreements, § 1. Liability is several, meaning that each defendant is independently liable up to the liability limits. *Id.* § 8 (d).

The parties do not dispute that the balance of the unpaid loan is greater than any of the individual limits of liability. For this reason, Continental may pursue each defendant to the extent of the liability limits (along with interest on such amounts) until the debt is satisfied.[1] Since defendants' liability is specifically circumscribed by the guaranties, damages ordinarily would be relatively certain. But the damage calculation is somewhat more complicated because defendants made periodic payments for roughly two years.

As each defendant made a payment, Continental made a corresponding reduction in that defendant's limit of liability. By January 1, 1990, defendants had stopped making payments altogether. Crediting defendants with the payments made prior to that date, Continental has determined that Robinson Everett is liable for $1,546,548.29, Kathrine Everett is liable for $1,546,543.51, and J.H. Froelich is liable for $561,913.68. As of April 10, 1991—the cutoff date used by Continental in submitting its damage calculations—interest continues to accrue at a rate of $435.59 per day for Robinson and Kathrine Everett, and $159.59 per day for J.H. Froelich.[2]

Continental's calculations, which are based on a straightforward application of the guaranties, appear to accurately reflect its actual damages. The defendants disagree. They contend that the loan payments should have been applied against the balance of the underlying loan, rather than their respective guaranty limits. Under defendants' approach, the principal of the loan is reduced by the payments made by all of the guarantors, and interest is then

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[1] Although the combined liability limits exceed the unpaid balance of the loan, Continental certainly cannot collect more than is actually due and owing.

[2] The applicable interest rate, set forth in the term note, is equal to Continental's prime rate plus 3%. (Continental's prime rate is currently 9%.)

determined according to each defendant's pro rata share[3] of the outstanding loan balance.

Defendants' method of calculation, as Continental points out, is inconsistent with the terms of the guaranty agreements. There is nothing to suggest, in the guaranties or the underlying loan documents, that interest is to be based on the guarantors' pro rata shares of the loan. On the contrary, the guaranties provide, in unambiguous terms, that defendants are liable for the stated limits of liability "plus interest *on such amount*[*s*]." *Id.* § 1 (emphasis added). Each defendant's liability is "independent of any other guaranties . . . [and] may be enforced in full regardless of the existence of any such other guaranties." *Id.* § 8(d). This language clearly demonstrates that payments made by one guarantor do not serve to reduce another's liability. Continental properly calculated defendant's liability for principal and interest.[4]

Having considered all of the parties' submissions, including their briefs, supporting affidavits, and exhibits, the court finds that there is no genuine issue of material fact with respect to the principal and interest due under the loan. The court hereby enters judgment in favor of Continental and against defendant Robinson Everett in the amount of $1,546,548.29, against Kathrine Everett in the amount of $1,546,543.51, and against J.H. Froelich in the

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[3] Pro rata liability is determined by each defendant's ownership interest in the debtor company.

[4] Defendants also argue that Continental should not have applied the default rate of interest as of January 1, 1990—even though that is the date when defendants dishonored their guaranties. In defendants' view, the default rate should have taken effect on March 14, 1990, when Continental made a demand for payment. This argument, like defendants' other arguments, lacks merit. Defendants initially went into default (and the default rate was therefore applicable) on the date they stopped making payment, not when Continental made a demand. Beside, defendants expressly waived their right to demand or notice of dishonor from Continental. Guaranty Agreements, § 6(c).

amount of $561,913.68. Robinson and Kathrine Everett are also liable for interest accruing at a rate of $435.59 per day, and J.H. Froelich must pay interest at a rate of $159.36 per day.[5]

Finally, defendants cannot dispute that Continental is entitled to attorneys' fees and expenses incurred in connection with the enforcement of the guaranties. *See id.* § 1. The only question in this regard is whether or not the amount of recoverable fees and costs must be determined prior to the entry of final judgment. Continental, over defendants' objection, has requested that fees and costs be assessed after judgment is entered. The court does not find this request unreasonable. The finality of the judgment is not impaired simply because the total amount of fees and costs has not yet been determined. *Barrington Press, Inc. v. Morey*, 816 F.2d 341, 342 (7th Cir.), *cert. denied*, 484 U.S. 906 (1987). The determination of the total fees and costs may be properly resolved in a postjudgment proceeding. *See id.* at 344 (Ripple, J., concurring). Any objection defendants may have to Continental's petition for fees and costs shall be made at that time.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Nicholas J. Bua
Judge, United States District Court

Dated: July 22, 1991

[5] This rate of interest is effective as of April 10, 1991. Of course, the rate may change as Continental's prime rate periodically changes.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 1476
Honorable Nicholas J. Bua, Presiding

CONTINENTAL BANK N.A.,

Plaintiff,

v.

ROBINSON EVERETT, KATHRINE EVERETT, and J.H. FROELICH,

Defendants.

MEMORANDUM ORDER

In 1984, plaintiff Continental Bank N.A. ("Continental") loaned a substantial sum of money to a North Carolina corporation. After that corporation filed for bankruptcy, Continental demanded repayment from eight individuals who guaranteed the loan. Having been paid by five of the guarantors, Continental seeks payment from the remaining three: Robinson Everett, Kathrine Everett, and J.H. Froelich. Continental contends that there is no factual dispute on the issue of liability and, therefore, its claim against these three guarantors may be resolved on summary judgment. This court agrees, and grants Continental's motion for summary judgment.

I. FACTS

The following facts are not in dispute. In 1983, an agent of Guilford Telecasters, Inc. ("Guilford") contacted Continental for purposes of obtaining a loan. Guilford, a North Carolina corporation, needed financing to operate a television station in North Carolina.

Several months of negotiations culminated in a loan agreement dated January 1, 1984. Pursuant to this agreement, Continental loaned $4,200,000 to Guilford. In connection with the loan, defendants Robinson Everett, Kathrine Everett, and J.H. Froelich agreed to guarantee repayment of the loan. The guaranty agreements were also executed on January 1, 1984. On December 31, 1985, Guilford executed and delivered a term note to Continental in evidence of the $4,200,000 loan.

To secure repayment of the loan, Continental obtained a security interest in Guilford's assets.[1] For the most part, Continental perfected its security interest in this collateral by filing the requisite financing statements with the appropriate governmental entities. Continental, however, did

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[1] The collateral for the loan is specified in section 6.1 of the loan agreement:

> 6.1 *Collateral.* Payment of [Guilford's] obligations hereunder and under the Notes shall be secured by the following:
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> (a) a first lien and security interest in favor of [Continental] in [Guilford's] accounts, chattel paper, general intangibles (including, but not limited to, any and all Franchises and FCC licenses), inventory, equipment (including, but not limited to, all cable, wires, appliances, towers, antennae, poles, studio equipment, converters, tools, vehicles and fixtures) and instruments, as those terms are defined in the Illinois Commercial Code, and the proceeds thereof, whether now owned or hereafter acquired, which lien and security interest shall be created by the Security Agreement; and
>
> (b) an assignment of each of the Leases pursuant to the Assignments of Lease; and
>
> (c) a pledge of all the issued and outstanding capital stock of the Company (the "Pledged Shares") pursuant to the Pledge Agreements.

Loan Agreement, § 6.1. As further evidence of Continental's security interest in Guilford's assets, the parties executed a security agreement dated January 1, 1984.

not perfect its security interest with respect to three of Guilford's most valuable assets: 1) Guilford's operating license from the Federal Communications Commission ("FCC"); 2) Guilford's broadcast tower lease; and 3) Guilford's studio lease.

For approximately two years, Guilford honored its obligations under the loan agreement. In 1986, Guilford's financial situation deteriorated. Guilford filed for Chapter 11 bankruptcy on December 31, 1986. Uncomfortable with this situation, Continental accelerated the payment schedule. On January 1, 1987, Continental sent a letter to Guilford demanding immediate payment in full.

As a debtor-in-possession, Guilford was in critical need of working capital to meet its daily operating expenses. Guilford's only source of funds was cash collateral.[2] Because Continental had a security interest in Guilford's cash collateral, Guilford needed either Continental's consent or the authorization from the bankruptcy court to use the collateral. On January 16, 1987, the United States Bankruptcy Court for the Middle District of North Carolina (the court presiding over Guilford's bankruptcy) entered an order authorizing Guilford to use the cash collateral on a limited basis. Approximately three weeks later, the bankruptcy entered a consent order which permitted Guilford to continue using the cash collateral. *See In re Guilford Telecasters, Inc.*, No. B-86-02633C-11 (Bankr. M.D.N.C. Feb. 5, 1987). The order was subject to several conditions for the protection of Continental's interests. One such condition was that Guilford's loan payments be made on a weekly basis.

Guilford continued paying Continental until May 1987. Unable to maintain its loan obligations, Guilford went into default. At that point, the guarantors picked up the loan

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[2] Cash collateral includes funds collected from Guilford's accounts and accounts receivable.

payments. In 1989, however, the guarantors also stopped paying Continental. To enforce the guaranties, Continental filed this lawsuit in federal court (based on diversity jurisdiction).[3] Robinson Everett, Kathrine Everett, and J.H. Froelich then moved to dismiss the case for lack of personal jurisdiction. That motion was denied. *See Continental Bank N.A. v. Everett*, 742 F. Supp. 508 (N.D. Ill. 1990). Continental now moves for summary judgment.

II. DISCUSSION

Continental may prevail on its motion for summary judgment only if there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conversely, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

Continental asserts that there is no genuine issue of material fact with respect to defendants' liability under the guaranty agreements. In an action to enforce a guaranty under Illinois law,[4] a prima facie case is established "when the plaintiff enters proof of the original indebtedness, the debtor's default and the guarantee." *Mid-City Indus. Supply Co. v. Horwitz*, 132 Ill. App. 3d 476, 483, 476 N.E.2d 1271, 1277 (1985). None of these elements are in dispute. Continental is therefore entitled to judgment on the guaranties unless defendants have a valid defense.

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[3] According to Continental, approximately $2,800,000 (excluding interest and collection expenses) remains due and owing on the loan.

[4] The parties do not dispute that Illinois law governs this loan transaction. *See Loan Agreement*, § 12.5; *Guaranty*, § 8(e).

Defendants have asserted four affirmative defenses and three counterclaims in opposition to Continental's claim. Since the allegations in defendants' counterclaims are parallel to those set forth in the affirmative defenses, the defenses and counterclaims shall be treated together.

A. First Affirmative Defense/Counterclaim

In their first defense, defendants raise three separate arguments regarding the collateral for the loan. First, defendants allege that when they executed the guaranty agreements, Continental failed to disclose a material fact—*i.e.*, that it is legally impossible to obtain a security interest in an FCC license. Second, defendants assert that their guaranties were conditioned on Continental's ability to perfect a security interest in all of the collateral. Third, defendants seek a discharge from the guaranties based on an "unjustified impairment of collateral" theory. The court will examine each theory separately.

1. Failure to Disclose a Material Fact

According to defendants, they entered into the guaranty agreements with the understanding that the loan was secured by more than enough collateral to protect them from loss in the event of a default by Guilford. The loan agreement stated that the loan would be secured by a first lien and security interest in the assets listed as collateral. *Loan Agreement*, § 6.1(a), *supra* note 1. Defendants apparently relied on Continental to take the necessary steps to perfect a security interest in the collateral put up by Guilford. What defendants did not realize, however, was that a party cannot obtain a security interest in an FCC broadcast license. *See Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). This is significant because the FCC license was one of Guilford's most valuable assets, a fact which Continental does not dispute. Defendants insinuate that Continental was aware that a security interest in the

license could not be obtained, yet chose not to inform them. Defendants further assert that they would not have executed the guaranties if Continental had disclosed the fact that a security interest in the FCC license could not be obtained. Based on Continental's nondisclosure, defendants seek a complete discharge from their obligations under the guaranties.

In response, Continental argues that defendants have expressly waived any objections to Continental's failure to perfect a security interest in the collateral. Specifically, Continental relies on section 6(c) of the guaranty agreement, which contains the following waiver provision: "The Guarantor hereby expressly waives . . . all diligence in . . . protection of or realization upon . . . any security for [the loan]." *Guaranty*, § 6(c). Continental also emphasizes that under section 6(a), it has the discretion to release or surrender its security interest. *Id.* § 6(a). These clauses are unavailing. Contractual waiver provisions do not foreclose defendants' first argument because defendants have brought Continental's good faith into question. In Illinois, a duty of good faith and fair dealing is implied in every contract (including guaranties), *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 989-90, 466 N.E.2d 958, 971 (1984); *McHenry State Bank v. Y & A Trucking, Inc.*, 117 Ill. App. 3d 629, 632-33, 454 N.E.2d 345, 348 (1983); *see also Jordan v. Duff and Phelps, Inc.*, 815 F.2d 429, 438 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); and the obligation to perform in good faith may not be waived. *BA Mortgage and Int'l Realty Corp. v. American Nat'l Bank and Trust Co.*, 706 F. Supp. 1364, 1376 (N.D. Ill. 1989); *Morris v. Columbia Nat'l Bank*, 79 Bankr. 777, 785 (N.D. Ill. 1987).

As a master of law, a creditor does not stand in a fiduciary relationship with the guarantor. *Farmer City State Bank v. Guingrich*, 139 Ill. App. 3d 416, 423, 487 N.E.2d 758, 763 (1985). In certain cases, however, the duty of good faith may require the creditor "to inform [the

guarantor] of circumstances which materially increase [the] risk as guarantor." *McHenry State Bank*, 117 Ill. App. 3d at 634, 454 N.E.2d at 349. If the creditor takes any action which "increases the guarantor's risk or deprives the guarantor of the opportunity to protect himself," the guarantor should be released from the guaranty to the extent of his injury. *Id.* at 633, 454 N.E.2d at 348.

In this case, there is evidence in the record that Continental knew, at the time of contracting, that it could not perfect a security interest in Guilford's FCC license. Continental did not inform defendants of this fact, even hough the license was a valuable asset. But this nondisclosure, standing alone, does not demonstrate that Continental was acting in bad faith. There is absolutely no evidence that Continental actively concealed material facts from defendants. The ability to obtain a security interest in a license is a matter of law, and such information was available to defendants from sources other than Continental. Notwithstanding Continental's duty of good faith, defendants have an obligation to make an inquiry into all circumstances that are relevant to their risk as guarantors. *St. Charles Nat'l Bank v. Ford*, 39 Ill. App. 3d 291, 295, 349 N.E.2d 430, 434 (1976). Defendants should have made some inquiry into the facts affecting their risk; their failure to do so precludes them from complaining of Continental's failure to disclose.

Defendants admit that as early as August 1987, they learned that Continental did not have a security interest in the FCC license. Rather than raising an objection to the collateral at that time, they continued to make payments under the guaranties for two more years. In light of the fact that defendants continued to honor their guaranties after discovering the truth, there is reason to question the sincerity behind defendants' declarations of bad faith. The Illinois Supreme Court has suggested that the failure to promptly object upon the discovery of fraud may, under certain circumstances, amount to a waiver. *Eisenberg v.*

Goldstein, 29 Ill. 2d 617, 195 N.E.2d 184 (1963), *cert. denied*, 377 U.S. 964 (1964). In *Eisenberg*, the court stated:

> A person who has been misled by fraud or misrepresentation is required, as soon as he learns the truth, to disaffirm or abandon the transaction with all reasonable diligence, so as to afford both parties an opportunity to be restored to their original position. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of relief from the misrepresentations.

Id. at 622, 195 N.E.2d at 186-87. At any rate, it is unnecessary to reach the waiver question because there is insufficient evidence pointing to a lack of good faith on the part of Continental.

Defendants have not cited any Illinois cases in which a creditor was deemed to have acted in bad faith by failing to disclose information relating to the risk of the guaranty. Instead, defendants rely primarily on a not-so-recent New York case, *First Citizens Bank & Trust Co. v. Sherman's Estate*, 250 A.D. 339, 294 N.Y.S. 131 (1937). In that case, the guarantor (Sherman) guaranteed a bank loan to his son-in-law (Hatfield). The guaranty agreement purported to fully detail the collateral securing the loan. At the top of the list of collateral was Hatfield's interest in the estate of his father, which Hatfield had assigned to the bank. The bulk of this estate consisted of a farm. Prior to the execution of the guaranty, the bank released its interest in the farm back to Hatfield. When Sherman signed the guaranty, he did not know that the loan was no longer secured by the farm, and the bank failed to inform him. The court concluded that the bank's nondisclosure amounted to fraud:

> While in many instances mere silence cannot be made the basis of fraud, yet, where the circumstances are

> of such a nature as to impose a duty upon one to speak, and where he deliberately fails to do so, his neglect will be deemed a deliberate suppression of the truth, and will amount to constructive, if not actual, fraud.

294 N.Y.S. at 139. Having determined that Sherman was misled by the bank's description of the collateral, the court disallowed the bank's claim for enforcement of the guaranty. *Id.* at 142.

Defendants also look to *Chemical Bank v. Layne*, 423 F. Supp. 869 (S.D.N.Y. 1976) for support. In *Chemical Bank*, the guarantor sought a discharge from his guaranty on the ground that the bank failed to disclose that certain stock held as collateral contained restrictions (which reduced the value of the stock as collateral). When the guarantor inquired into the value of the stock, the bank did not inform him that it was restricted. The guarantor stated that he would not have executed a guaranty if he had been fully informed by the bank. Because the bank failed to disclose a material fact upon the guarantor's inquiry into the underlying collateral, the court found the guaranty to be unenforceable. *Id.* at 882.

In stark contrast to the banks involved in those two cases, Continental did not deliberately suppress pertinent information *that was not readily available* to the guarantors. While recognizing the bank's duty of disclosure as described in *Sherman's Estate*, the court in *Chemical Bank* emphasized that "duties of inquiry and awareness fall upon the guarantor." *Id.* at 871. "To ensure the enforceability of guaranties, banks need do no more than make full and fair disclosure in response to the inquiry of a potential guarantor." *Id.* at 881. Far from supporting defendants' position, *Chemical Bank* made it clear that guarantors have an obligation to seek important information and inform themselves—an obligation which, as stated earlier, was not satisfied in this case.

It is not entirely clear why defendants chose to guaranty such a large loan without first inquiring into the status of the collateral. Defendants' nescience in this case is particularly inexcusable: as principals and shareholders of Guilford, defendants were intimately familiar with the company and the value of its assets as collateral. Having failed to make any inquiry whatsoever, defendants now cannot seek to void the guaranties based on Continental's silence.

2. Collateral as a Condition Precedent

Defendants' second argument is that Continental's ability to perfect a security interest in the collateral was a condition precedent to their performance under the guaranties. Since Continental did not perfect a security interest in the FCC license, Guilford's tower lease, or Guilford's studio lease, defendants contend that they should be excused from their guaranties. This court disagrees.

None of the guaranty agreements or corresponding loan documents confirm defendants' assertion that obtaining a security interest in all of the collateral was a condition precedent to the guaranties. There is no reference to such a condition precedent in the contracts.[5] Nor is there any evidence of an unwritten mutual understanding between Continental and the guarantors. Continental never made any oral representations which validate the existence of the alleged condition. And, while defendants contend that they believed that the guaranties were conditional, they did not communicate this belief to Continental.

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[5] Defendants claim that the condition precedent can be found in section 10 of the loan agreement. Defendants' reliance on that section is misplaced. Section 10 merely specifies the conditions that had to be met by *Guilford* before Continental would issue the initial revolving loan. It simply does not speak to the issue of whether defendants' guaranties were conditioned on Continental's ability to obtain a security interest.

Although the loan was to be secured by Guilford's assets, it does not necessarily follow that the guaranties were conditioned on Continental's ability to perfect a security interest in those assets. The guaranty agreements certainly do not provide any support for defendants' argument; those agreements expressly provide that repayment is "unconditionally" guaranteed. *See Guaranty*, § 1. The agreements also vested Continental with discretion to release or surrender its security interest without notice to the guarantors. *Id.* § 6(a). Given the fact that Continental could release its security interest without altering its rights under the guaranties, it seems implausible that the guaranties were conditioned on perfecting the security interests.[6]

Even if the guaranties were conditional, defendants still cannot justify their nonperformance. The security agreement, which granted Continental a security interest in Guilford's assets, was for the benefit of Continental, not the guarantors. *Security Agreement*, ¶ 2. Continental was

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[6] Defendants contend that this case is controlled by *State Bank v. Cirivello*, 74 Ill. 2d 426, 386 N.E.2d 43 (1978), a case in which twelve limited partners guaranteed a loan to the partnership. When the guaranty was executed in *Cirivello*, the bank represented that the loan would not be made unless all thirteen of the limited partners in the partnership personally guaranteed repayment. Yet the bank disbursed the loan even though only twelve of the thirteen limited partners signed the guaranty. The partnership defaulted, prompting the bank to file suit against the guarantors. The court held that the guaranty was unenforceable because the loan was conditioned on all thirteen limited partners becoming guarantors. *Id.* at 433, 386 N.E.2d at 46. Despite defendants' heavy reliance on *Cirivello*, this court agrees with Continental that *Cirivello* is distinguishable from the case at bar. Continental, unlike the bank in *Cirivello*, never made any representation or otherwise led the guarantors to believe that the guaranties were subject to a condition precedent. The remaining cases cited by defendants, see *United States v. Hub City Volkswagen, Inc.*, 625 F.2d 213 (9th Cir. 1980); *Mount Prospect State Bank v. Forestry Recycling Sawmill*, 93 Ill. App. 3d 448, 417 N.E.2d 621 (1980); *Federal Nat'l Bank & Trust Co. v. Shanon Drilling, Inc.*, 762 P.2d 928 (Okla. 1988), which involved evidence of a condition precedent, are equally distinguishable.

therefore free to waive its right to perfect a security interest in each and every unit of collateral. *See FDIC v. Nanula*, 898 F.2d 545, 550 (7th Cir. 1990).[7]

This court will not allow defendants to use the security agreement, an agreement executed for the benefit and protection of Continental, as a basis for nonperformance under the guaranties. *See Marine Midland Bank v. Smith*, 482 F. Supp. 1279, 1291 (S.D.N.Y. 1979), *aff'd*, 636 F.2d 1202 (2d Cir. 1980). The governing contracts were hammered out after several months of negotiations. Absent any solid evidence of a condition precedent, whether created by written or oral agreement, the contracts as written will be presumed to reflect the full intent of the parties. The court declines defendants' invitation to set aside the guaranties based on some unsubstantiated inference. Accordingly, the court rejects defendants' second argument.

3. Unjustified Impairment of Collateral

The final argument raised in defendants' first affirmative defense also rests on Continental's failure to perfect a security interest in the FCC license, the tower lease, and the studio lease. Defendants characterize this omission as a breach of Continental's duty of good faith, which "result[ed] in an unjustified impairment of collateral, discharg[ing] the obligations of the defendants under the guaranties by operation of law." *Joint Amended Answer to Complaint*, ¶ 47. Insofar as this argument is premised on Continental's failure to perfect a security interest in

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[7] A strong argument could also be made that defendants waived the condition, if one indeed existed. In 1987, defendants first discovered that Continental had not perfected its security interest in certain collateral. Defendants nonetheless continued to make payment in accord with the guaranties until 1989. After complying with the guaranties for over two years, defendants now contend that the guaranties are unenforceable. In this court's view, defendants' actions speak louder than their words.

the FCC license, the court has already addressed this issue and resolved it in favor of Continental. Setting aside the FCC license, the court must still address defendants' argument regarding the tower and studio leases.

As an initial matter, the court notes that there is nothing in the record which supports defendants' argument. Defendants have come forward with no facts upon which to infer that Continental acted in bad faith by failing to perfect a security interest in the leases. While Continental should have taken better care to protect its own security interests, defendants cannot attribute an improper motive to Continental based on that proposition alone. Defendants allege that they were relying solely on Continental's efforts in handling the collateral; but there is no indication that Continental was aware of this fact. Defendants never put Continental on notice that they were depending on Continental to file all the necessary documentation to perfect a security interest in the leases. Without showing that Continental was aware of defendants' reliance, defendants can hardly prove that Continental's omissions rose to level of bad faith. Considering the fact that defendants made no effort to stay informed as to the status of the collateral, they are in no position to complain of Continental's inaction or question its underlying motives.

In any event, to prevail on their unjustified impairment of collateral defense, defendants do not have to establish that Continental acted in bad faith. Unfortunately for defendants, the waiver clauses set forth in the guaranties, which do not come into play with respect to defendants' bad faith argument, do affect defendants' impairment of collateral defense. Defendants' objection to Continental's failure to perfect a security interest, unlike good faith conduct, is waivable. *See Morris,* 79 Bankr. at 781-82.

In determining whether defendants waived their rights, the court looks to the language of the guaranties. "Where a contract of guaranty is unequivocal in its terms it must

be interpreted according to the language used, for it is presumed that the parties meant what their language clearly imports." *National Acceptance Co. v. Exchange Nat'l Bank*, 101 Ill. App. 2d 396, 402, 243 N.E.2d 264, 267 (1968). The guaranty agreements in this case contain the following waiver clause:

> (c) *The Guarantor hereby expressly waives:* (i) notice of the acceptance by the Bank of this Guaranty, (ii) notice of the existence or creation or non-payment of all or any of the Liabilities, (iii) presentment, demand, notice of dishonor, protest and all other notices whatsoever, and (iv) *all diligence in collection or protection of or realization upon the Liabilities or any thereof, any obligation hereunder, or any security for or guaranty of any of the foregoing.*

Guaranty, § 6(c) (emphasis added). In addition, the guaranties permit Continental to release, surrender, or substitute any of its security interests:

> (a) The Bank may, from time to time, whether before or after any discontinuance of this Guaranty, *at its sole discretion and without notice to the Guarantor*, take any or all of the following actions: . . . (iv) *release its security interest in, or surrender, release or permit any substitution or exchange for, all or any part of any property securing any of the Liabilities or any obligation hereunder*, or extend or renew for one or more periods (whether or not longer than the original period) or release, compromise, alter or exchange any obligations of any nature of any obligor with respect to any such property, and (v) resort to the Guarantor for payment of any of the Liabilities, whether or not the Bank shall have resorted to any property securing any of the Liabilities or any obligation hereunder or shall have proceeded against any other obligor primarily or secondarily obligated with respect to any of the Liabilities.

Id. § 6(a) (emphasis added). Based on the express language in the guaranties, the court concludes that defendants have waived their right to complain of Continental's failure to perfect a security interest. Other courts have found similar contractual provisions to constitute a waiver of the guarantor's rights. *See FDIC v. Hardt*, 646 F. Supp. 209, 212-13 (C.D. Ill. 1986); *Exchange Nat'l Bank v. Brown*, 41 U.C.C. Rep. Serv. (Callaghan) 895, 897-98 (N.D. Ill. 1985); *National Acceptance Co. v. Wechsler*, 489 F. Supp. 642, 646-47 (N.D. Ill. 1980); *National Acceptance Co. v. Demes*, 446 F. Supp. 388, 390-91 (N.D. Ill. 1977); *Ishak v. Elgin Nat'l Bank*, 48 Ill. App. 3d 614, 617, 363 N.E.2d 159, 161-62 (1977). The agreements executed by defendants disclaim "all diligence" in the "protection of or realization upon" "any security" for the loan. *Guaranty*, § 6(c).[8] Even if, as defendants argue, section 6(c) is not explicit enough to constitute a valid waiver, section 6(a) provides ample support to conclude that defendants have waived their impairment of collateral defense. Section 6(a) unambiguously states that Continental may release its security interest

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[8] Pointing to Ill. Rev. Stat. ch. 26, para. 1-102(3) (1989), defendants contend that obligations of diligence may not be waived. That statutory provision states as follows:

> The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care *prescribed by this Act* may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Id. (emphasis added). Contrary to defendants' contention, paragraph 1-102(3) is inapplicable. The statute does not prevent disclaimers of diligence in all circumstances; it only prevents parties from disclaiming provisions of the Uniform Commercial Code which prescribe obligations of diligence. *See* Ill. Ann. Stat. ch. 26, para. 1-102 (Smith-Hurd) (Uniform Commercial Code Comment). Unable to identify any provisions in the Code that prescribe Continental's diligence in perfecting its security interests in this case, defendants cannot invoke paragraph 1-102(3).

without any notice to the guarantors. "To say that the creditor can completely dispose of collateral but would retain liability to perfect on the very same collateral does not make sense." *Hardt*, 646 F. Supp. at 213. By consenting to the release or surrender of the collateral, defendants cannot protest Continental's failure to perfect a security interest.[9]

The terms of the guaranties were freely negotiated by sophisticated parties, and defendants have not proffered a viable basis for avoiding the effect of these terms. Thus, defendants have waived their right to complain of Continental's failure to perfect its security interest.

In sum, the court concludes that none of the arguments asserted in defendants' first affirmative defense and counterclaim can withstand Continental's motion for summary judgment.

B. Second Affirmative Defense/Counterclaim

Defendants' second defense and counterclaim stem from a payment schedule agreement allegedly breached by Continental. Defendants assert that sometime after Guilford filed for bankrupty, the parties entered into a payment agreement that modified the original terms of repayment. The original loan agreement provided for a reduction of principal on a quarterly basis. For the first two years, the quarterly payments were to be made at a rate of 1.5% of the outstanding principal balance. The following year, the rate of repayment increased to 3.5% of the principal. The quarterly payments were to increase to 5.0%, 6.0%, and

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[9] The security agreement provides additional support for Continental's waiver argument. Paragraph 6.3 of the agreement states that Continental has no affirmative duty with respect to perfecting its own security interests: "[t]he Bank shall have *no duty as to the* collection or *protection of the Collateral* or any part thereof or any income thereon, *or as to the preservation of any rights pertaining thereto*, beyond the safe custody of any Collateral actually in the Bank's possession." *Security Agreement*, ¶ 6.3 (emphasis added).

7.0% in the fourth, fifth, and sixth years respectively. Under the modified repayment schedule, the loan would continue to be amortized at a rate of 1.5% per quarter, with no yearly increase. In consideration for maintaining the rate of repayment at 1.5%, defendants agreed to accelerate payment of principal and interest from a quarterly basis to a monthly basis. Defendants claim that this new repayment schedule was to be in effect until the bankruptcy proceeding was finally resolved—that is, pending a successful reorganization of Guilford or the liquidation of its assets. In 1989, while the bankruptcy was still pending, Continental allegedly breached the payment agreement by demanding payment in accord with the original terms of the loan agreement.

At the outset, Continental has denied the very existence of the alleged repayment scheme. Although defendants have detailed the terms of the agreement in their joint amended answer, they cannot merely rest on their pleading. Defendants bear the burden of proof on their affirmative defenses and counterclaims, and they "must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County REMC*, 840 F.2d 405, 410 (7th Cir. 1988) (emphasis in original). After reviewing all of the briefs, affidavits, and exhibits submitted in this case, the court is unable to conclude that defendants have come forward with enough facts to create a genuine issue as to whether the parties entered into a binding agreement.

The guaranties expressly provide that Continental is not bound by any proposed modification of the terms of the guaranties unless such modification is in writing and signed by Continental. *See Guaranty*, § 8(a) ("nor shall any modification or waiver of any of the provisions of this Guaranty be binding upon the Bank except as expressly set forth in a writing duly signed and delivered on behalf of the Bank"). Since the terms of the alleged payment agreement

were not outlined in a writing signed by Continental, the payment agreement is not binding on Continental.

Assuming that Continental could be bound by an oral modification of the guaranties, there is insufficient evidence in the record that Continental actually sat down and agreed to modify the repayment terms of the existing loan and guaranty agreements. Defendants maintain that the payment agreement arose from the consent order entered by the bankruptcy court in early 1987, and that they made their monthly payments pursuant to that order. *See Defendants' Joint Response to Continental Bank's Memorandum in Support of its Motion for Summary Judgment*, at 23, 26, 28. But even the consent order states that any payments made pursuant to the order did not relieve defendants of their primary obligations to Continental: "The terms of this Order . . . shall not affect in any way the liability of any guarantors of any obligations of [Guilford] to [Continental]." *In re Guilford Telecasters, Inc.*, No. B-86-02633C-11, at 8 (Bankr. M.D.N.C. Feb. 5, 1987).

In support of their position that Continental amended the terms of repayment, defendants rely primarily on several letters that Continental's local counsel sent to the guarantors on a monthly basis between 1987 and 1989. These letters set forth the pro rata share of the loan payments which were attributable to each guarantor for the particular monthly period. Defendants insist that the letters reflected Continental's intent to maintain a payment schedule at a steady 1.5% rate of amortization.

There is nothing to suggest that by sending these letters, Continental bound itself to continue accepting reduced payments indefinitely. Perhaps Continental accepted smaller monthly payments to accommodate defendants' financial difficulties. Nonetheless, by accepting the monthly payments, Continental did not expressly surrender its rights to enforce the plain terms of the guaranties. *See United States v. Bachman*, 601 F. Supp. 1537, 1541-42

(E.D. Wis. 1985). Continental, moreover, never made any representation or otherwise gave any indication that the guarantors would be released if the payments were accelerated. To the contrary, the guaranties specifically state that the guarantors are not relieved of their obligation if the payments are accelerated: "The Guarantor hereby unconditionally guarantees the full and prompt payment when due, *whether by acceleration* or otherwise . . . ." *Guaranty*, § 1 (emphasis added). Any acceleration of payment, in the absence of bad faith, does not excuse the guarantors from their primary obligations under the guaranty agreements.

Defendants, however, have attempted to excuse their nonperformance on the ground that Continental committed a breach of the duty of good faith. This implied duty serves to protect the reasonable expectations of the parties. *Dayan*, 125 Ill. App. 3d at 991, 466 N.E.2d at 972. Stated differently, the parties to a contract may not take opportunistic advantage of one another. *Jordan*, 815 F.2d at 438. The court is not convinced that under the circumstances of this case, Continental was opportunistic in its enforcement of the guaranties. Guilford's financial demise certainly provided reasonable grounds for uncertainty on the part of Continental. There is no evidence that Continental acted arbitrarily when seeking prompt payment from the guarantors. Defendants essentially maintained a unilateral expectation that the loan payments would remain constant for an indefinite period of time. But defendants cannot avoid the force of the guaranty agreements based on this largely unsubstantiated expectation.

Defendants' second affirmative defense and counterclaim do not preclude the entry of summary judgment in favor of Continental.

C. Third Affirmative Defense/Counterclaim

In their third defense and counterclaim, defendants again accuse Continental of committing a breach of the duty of

good faith and fair dealing. In support of this accusation, defendants contend that Continental was uncooperative in Guilford's efforts at reorganization. When Guilford's stockholders decided to replace the general manager (ostensibly for the good of the company), they requested Continental's cooperation in the matter. Before implementing a change in management, however, defendants had to obtain the approval of the bankruptcy court. Defendants now assert that Continental did not provide any assistance in obtaining the court's approval. As further evidence of a lack of good faith, defendants point to the fact that Continental voted against the reorganization plan submitted by Guilford in the bankruptcy proceeding—a plan supported by a majority of the stockholders and guarantors. By voting against the proposed plan, Continental allegedly "protracted the Chapter 11 proceeding and prevented defendants from obtaining approval of a plan of reorganization whereunder their loss on guaranties would be substantially reduced without preventing plaintiff from receiving full payment." *Joint Amended Answer to Complaint,* ¶ 65. Defendants contend that Continental also breached its good faith duty by "precipitously" filing this lawsuit while the parties were still negotiating an acceptable plan of reorganization.

From a factual standpoint, it is apparent that Continental did not take any position during the bankruptcy proceedings with respect to Guilford's proposed change in management. If defendants are suggesting that in order to discharge its duty of good faith, Continental had to take affirmative steps in support of the managerial change, then defendants' argument may be summarily rejected. Defendants have cited no authority which places such an affirmative duty on creditors to actively promote the decisions of the debtor, irrespective of that creditor's interests. Similarly, there is no reason why Continental should have voted in favor of a proposed plan of reorganization if that plan was against its interests in collecting on the

loan. *See Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1358 (7th Cir. 1990) ("The Bank was entitled to advance its own interests, and it did not need to put the interests of Debtor and Debtor's other creditors first.").

The implied duty of good faith provides a check against discretionary actions that are arbitrary or capricious, *Dayan*, 125 Ill. App. 3d at 991, 466 N.E.2d at 972, not those that are arguably justified under the contract and surrounding circumstances. When the guarantors stopped making the loan payments altogether, Continental had every reason to enforce its rights under the loan and guaranty agreements. The filing of this lawsuit was indeed justified. As for defendants' assertion that the lawsuit was filed without adequate notice, the court directs defendants' attention to section 6(c) of the guaranties, wherein defendants unambiguously waived their right to notice.

Defendants' third defense and counterclaim cannot defeat Continental's motion for summary judgment.

D. Fourth Affirmative Defense

Neither Continental (in its motion for summary judgment) nor defendants (in their response thereto) have even mentioned the fourth affirmative defense. Defendants' fourth defense consists of the following sentence:

> Upon information and belief, Continental has been paid in excess of $2.5 million dollars by these defendants and others and accordingly the plaintiff has received payments which have not been properly credited in computing whatever amount might be owed to plaintiff under their guaranties, assuming any liability exists under those documents.

Joint Amended Answer to Complaint, ¶ 68. In regard to the issue of liability, there is nothing in the record which illuminates the significance of this defense. The amount

already paid by defendants may serve to reduce the amount of damages recoverable by Continental (which is not at issue here), but is will not support a wholesale dismissal of Continental's claim. This defense does not preclude summary judgment on the issue of liability.

Finally, the court will briefly address a jurisdictional matter. When this court previously denied defendants' motion to dismiss for lack of personal jurisdiction, the court stated that "Continental must nonetheless adduce sufficient facts at trial demonstrating the existence of personal jurisdiction." *Everett*, 724 F. Supp. at 512 n.7. After reviewing the statement of facts and exhibits submitted by the parties, the court finds that the facts supporting the finding of jurisdiction under the Illinois long-arm statute are not in dispute. Consequently, there are no jurisdictional barriers to the entry of summary judgment in this case.

III. CONCLUSION

The court finds that Continental has established all of the elements of its claim and that defendants have no valid affirmative defenses or counterclaims. Therefore, Continental's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Nicholas J. Bua
Judge, United States District Court

Dated: March 28, 1991